



DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
901 NORTH STUART STREET
ARLINGTON VA 22202-1837

REPLY TO
ATTENTION OF

JALS-PFB

22 May 2008

MEMORANDUM FOR Commander, United States Army Medical Materiel Center, Europe
(USAMMCE), APO AE 09138

SUBJECT: Request for Compelling Reasons Determination

1. On 21 May 2008, National Air Cargo Holdings, Inc. (NACH), its subsidiary companies and certain corporate officers were proposed for debarment by the Department of the Air Force (Encl. 1). This action effectively debars NACH from contracting with any agency in the Executive branch of the United States Government in accordance with Section 9.406 of the Federal Acquisition Regulation ("FAR"). This action was taken by the Air Force based on NACH's guilty plea on 25 October 2007, to a one count criminal Information in the United States District Court for the Western District of New York, charging NACH with knowingly and willfully making a material false statement to the Department of Defense, in violation of 18 U.S.C. § 1001(a)(2). On 26 March 2008, the plea agreement was amended to include settlement of the civil complaint under which NACH agreed to pay to the Government over \$28,000,000.00 million dollars in restitution, fines, forfeitures, and False Claims Act damages and penalties.

2. Agencies shall not renew or otherwise extend the duration of current contracts, or consent to subcontracts, with the contractors debarred, suspended or proposed for debarment, unless the agency head or a designee with authorized representative status, states in writing the compelling reasons for renewal or extension in accordance with the provisions of the FAR 9.405-1(b) and 9.405-2.

3. The USCENTCOM Class VIII Medical Supply Tender provides for transportation of medical supplies from Germany and Qatar to Iraq, Afghanistan, Qatar, Kuwait and Djibouti. National Air Cargo Group (NACG), a NACH subsidiary, currently handles over 90 percent of these shipments. Although there are four carriers approved for use in this area, only NACG has completed thorough testing and has the capability/network to handle these shipments. The other three carriers either do not have the capability, have chosen not to solicit the business or have not yet completed the required testing. The limited downrange storage capability requires a reliable, time-definite delivery of medical supplies. These shipments include hazardous material, narcotics, and other material that requires temperature-controlled cold chain processes.

4. The U.S. Army Medical Materiel Center, Europe (USAMMCE) submitted a request for a compelling reasons determination to continue to do business with NACG (including affiliated individuals and companies) based upon grounds stated in Enclosure 2. USAMMCE's request was referred to the Chief, Procurement Fraud Branch, Office of the Judge Advocate General, consistent with Section 5109.405 of the Army Federal Acquisition Regulation Supplement. The Chief, Procurement Fraud Branch recommended approval of the request.

5. I have determined that USAMMCE has provided compelling reasons to continue to do business with NACG and its affiliated individuals and companies named in the proposed debarment memorandum for 60 days from the date of this letter for the following reasons and for those enumerated in the enclosed documents:

- a. NACG 's present ability to deliver within 96 hours to all destinations and next-day flight for life or death urgent shipments.
- b. Cold-chain management both small shipments and large (over 300 lbs) to include re-icing capabilities; both wet and dry-ice.
- c. Narcotics shipment and need for onboard courier service.
- d. HAZMAT shipments and documentation process and procedures.

6. Pursuant to Section 209.405 of the Defense Federal Acquisition Regulation Supplement, written notification will be provided to the General Services Administration of this compelling reasons determination for USAMMCE to conduct business with a contractor that is suspended or debarred from procurement programs.

7. Questions regarding this action should be addressed to: U.S. Army Legal Services Agency, Procurement Fraud Branch, ATTN: [REDACTED], 901 North Stuart, Suite 700, Arlington, Virginia, 22203-1837. [REDACTED].

[REDACTED]

ROBERT N. KITTEL
Army Suspension and Debarment Official

2 Encls

1. The Air Force Memorandum in Support of Proposed Debarment for NACH, dated 21 May 2008
2. USAMMCE request for Compelling Reasons Determination dated 13 May 2008.

ENCL 1



DEPARTMENT OF THE AIR FORCE

Arlington, Virginia 22203



Office of the Deputy General Counsel

MEMORANDUM IN SUPPORT OF THE PROPOSED DEBARMENTS OF:

MAY 21 2008

NATIONAL AIR CARGO HOLDINGS, INC.
NATIONAL AIR CARGO, INC.
NATIONAL AIR CARGO GROUP, INC., dba
MURRAY AIR, dba
NATIONAL AIRLINES
NAC ACQUISITIONS LLC
NATIONAL AIR CARGO LUXEMBOURG S.A.R.L.
NATIONAL AIR CARGO MADEIRA, SGPS, UNIPESOAL LDA
NATIONAL AIR CARGO MIDDLE EAST FZE, DUBAI, U.A.E.
NACM OHQ SDN BHD, MALAYSIAN OHQ
NACM OHQ HOLDINGS, MALAYSIAN OPERATING COMPANY
NAC AC VENTURES LLC
NAC 300 LLC
NAC 2000 LX LLC
NATIONAL AIR CARGO DEUTSCHLAND GMBH
WINDWARD DRIVE LOT 12 LLC
CHRISTOPHER J. ALF
MICK CIHAK
RAYMOND MACHLOWSKI
JOHN WEIR
LORI ALF, aka
LORI SMISTEK, aka
LORETTA ALF, aka
LORETTA SMISTEK

Effective this date the Air Force has proposed the debarments of National Air Cargo Holdings, Inc. (NACH), National Air Cargo, Inc. (NAC), National Air Cargo Group, Inc., dba Murray Air dba National Airlines (NACG), NAC Acquisitions LLC (NACA), National Air Cargo Luxembourg S.A.R.L. (NAC-L), National Air Cargo Madeira, SGPS, Unipesoal LDA (NAC-M), National Air Cargo Middle East FZE, Dubai, U.A.E. (NAC-ME), NACM OHQ SDN BHD, Malaysian OHQ (NACM), NACM OHQ Holdings, Malaysian Operating Company (NACM Holdings), NAC AC Ventures LLC (NAC AC), NAC 300 LLC (NAC 300), NAC 2000 LX LLC (NAC 2000), National Air Cargo Deutschland GmbH (NAC-D), Windward Drive Lot 12 LLC (Windward), Christopher J. Alf (Alf), Mick Cihak (Cihak) Raymond Machlowski (Machlowski), John Weir (Weir), and Lori Alf aka Lori Smistek aka Loretta Alf aka Loretta Smistek (Smistek) from government contracting and from directly or indirectly receiving the benefits of federal assistance programs. These actions are initiated pursuant to Federal Acquisition Regulation (FAR) Subpart 9.4.

INFORMATION IN THE RECORD

Information in the record establishes that at all times relevant hereto:

1. NAC was a New York corporation with its corporate offices at 350 Windward Drive, Orchard Park, New York. NAC was an air freight forwarder engaged in the business of transporting property from the point of receipt to the point of destination, utilizing the services of a direct air carrier. As an air freight forwarder, NAC was also an indirect air carrier.
2. NACH was a New York corporation with its corporate offices at 350 Windward Drive, Orchard Park, New York. NACH was the corporate parent of NAC. NACH was also the corporate parent of NACA, NAC-L, NACM, NACM Holdings, and NAC AC.
3. NACG was a Michigan corporation with its corporate offices at 835 Willow Run Airport, Ypsilanti, Michigan. NACG was a subsidiary of NAC.
4. NAC-M and NAC-ME were subsidiaries of NAC-L.
5. NAC 300 and NAC 2000 were subsidiaries of NAC AC.
6. Alf was the owner and president of NACH and the president of NAC. Alf was the chief executive officer of NACG. Alf was listed as NAC's primary point of contact for government business on the Central Contractor Registration website. Alf was personally and substantially involved in various aspects of NACH, NAC, and NACG's operations. Alf was married to Smistek.
7. Cihak and Weir were NAC vice presidents. Machlowski was a NAC senior manager.
8. Smistek was a NAC vice president. Smistek was married to Alf.
9. NACH and Windward were New York companies wholly owned by Alf.
10. NAC-D was a German company wholly owned by Alf.
11. On or about March 17, 1997, NAC entered into an agreement with the Military Traffic Management Command (MTMC), under which NAC was permitted to offer air freight forwarder services to DoD. This agreement specified that rates for the movement of DoD cargo by air were to be filed with the Air Force Air Mobility Command (AMC). As part of the agreement, NAC agreed to comply with various DoD regulations.
12. On September 24, 1997, the DoD granted NAC final approval to participate in the shipment of general commodities as an air freight forwarder under the Carrier Qualification Program. NAC was assigned a standard carrier alpha code (SCAC) as an air freight forwarder of "NACQ." This approval and the assignment of the SCAC authorized NAC to participate as a freight forwarder only in connection with the shipment of freight by air.

13. The rates offered to DoD for air freight forwarder services were set forth in "tenders" prepared by NAC and submitted to AMC. The tenders offered varying levels of service, consisting of priority (SG), overnight (D1), and second day (D2) delivery. NAC charged a higher rate for priority service than for overnight or second day delivery. Similarly, NAC's rate for overnight delivery was higher than for second day service. Beginning in January 2007, as a result of a Base Realignment and Closure action, transportation tenders were submitted to U.S. Transportation Command instead of AMC.

14. NAC's tenders specifically cited *Air Mobility Command Freight Traffic Rules Publication No. 5 (AFTRP 5)* as a governing publication for shipments under its tenders. A stated purpose of AFTRP 5 was to "articulate the air transportation service needs of the Department of Defense (DoD) for the movement of its freight traffic." It did not require DoD transportation officers (TOs) to contract for the shipment of freight by air. It merely set forth the rules for air shipments in situations in which the TOs determined that shipments by air were required to meet the Government's needs. Specifically, AFTRP 5 required, among other things, that "In no case will the carrier bill for a higher level of service than that actually provided."

15. NAC was subject to audits by the U.S. Government. NAC understood it had an obligation to keep true and accurate records relating to air freight forwarding services it provided to DoD.

16. In July 1999, DoD began using an electronic payment system known as the PowerTrack system. NAC was responsible for inputting shipment information into the PowerTrack system. Based upon the information NAC entered into the PowerTrack system, payments were approved by DoD and made electronically to NAC.

17. Between in or about January 1999 and in or about August 2005, NAC engaged in a scheme to defraud the U.S. Government by routinely accepting freight for priority or overnight delivery under its air transportation tenders, and instead of shipping the freight by air it shipped freight entirely by surface, knowing that the shipments would not arrive within the specified delivery time. Even though NAC did not provide the requested, higher priced, levels of service, NAC billed the U.S. Government as if it had. By way of illustration, on Monday January 7, 2002, NAC received a mission essential shipment of aircraft parts representing to the Government that it would ship those parts overnight by air from Texarkana, Texas to Camp Lejeune Marine Corps Base, North Carolina, a distance of approximately 1100 surface miles. Contrary to NAC's representations, NAC shipped the freight entirely by truck, delivering it to Camp Lejeune on Thursday January 10, 2002. NAC then entered false information into the PowerTrack system reflecting an on-time delivery date of January 8, 2002. Based on NAC's actions, the U.S. Government was deceived into believing that the shipment had been delivered on time, and therefore paid NAC for the higher priced overnight service.

18. This example is not isolated. Investigators reviewed records pertaining to approximately 6800 NAC shipments between March and June 2001, and between January and March 2002. In approximately 2995 of those shipments, NAC delivered the freight late. In over 70% of those late deliveries, NAC billed DoD as if the freight had been delivered on time. In most cases NAC accepted payment from DoD as if the shipment had been delivered on time.

19. NAC also concealed the fact that it was routinely shipping freight wholly by surface transportation by providing false shipment status information designed to deceive its customers. For example, NAC's tracking website (relied upon by DoD) reflected that shipment reference number 020043c1, HAWB 870007552, TCN WT4KD84079010LXX, was "confirmed on board flight" and had "arrived on flight." In reality, NAC had shipped the freight entirely by truck.

20. Alf instituted a policy at NAC that employees would report delivery dates as the contracted for date of delivery and not the actual date of delivery, regardless of when the delivery was actually made. At the direction of Alf and Weir, Cihak and Machlowski altered shipping documents provided to the Government to falsely reflect that late deliveries had arrived on time. Alf, Cihak, Machlowski, and Weir instructed and otherwise encouraged NAC employees to enter false information into the PowerTrack system and various manually created forms.

21. NAC provided air freight forwarding services to the Defense Distribution Center Anniston, Alabama (Anniston). As part of its audit functions, from time to time Anniston would request hard copies of proofs of delivery (PoD), noting that Anniston required 95% on time delivery in order to keep working with a particular air freight forwarder.

22. On or about February 23, 2001, Anniston requested hard copies of various PoDs from NAC. In response to that request, on March 19, 2001, NAC intentionally provided to Anniston a false and altered PoD for bill of lading 012612AA. The PoD initially reflected the truthful (and late) delivery date of January 26, 2001. Prior to submitting the PoD to Anniston, NAC altered the document to falsely state that the shipment had been delivered to DoD on January 24, 2001 (on time).

23. On April 7, 2005, a *qui tam* complaint was filed alleging that NAC and Alf violated the False Claims Act, 31 U.S.C. §§ 3729-3733, when submitting claims for payment to the DoD for amounts in excess of what NAC was entitled to receive under its contracts with DoD.

24. On October 25, 2007, a one-count Information was filed in the United States District Court for the Western District of New York (USDC-WDNY) charging NAC with knowingly and willfully making a material false statement to DoD, in violation of 18 U.S.C. §1001(a)(2).

25. On October 25, 2007, NAC entered into an agreement with the U. S. Attorney for the Western District of New York to plead guilty to the criminal Information. On March 26, 2008, the parties filed an amendment to the plea agreement which included settlement of the civil complaint. Under the terms of the settlement agreement NAC agreed to pay to the Government \$4,400,000 in restitution, \$8,800,000 in fines, \$7,429,000 in forfeitures, and \$7,371,000 in False Claims Act damages and penalties.

26. On April 3, 2008, a criminal judgment was filed against NAC in the USDC-WDNY based upon its felony conviction.

27. I have met with NAC's counsel at their request, and carefully reviewed all written submissions made to the Air Force by NAC, all of which have been included in the administrative record.

28. Subject to reviewing any additional information and argument that may be made in response to this notice of proposed debarment, I find that the allegations of misconduct set forth herein are established by a preponderance of the evidence in the administrative record. I also find at this stage of the proceedings that NAC has failed to meet its burden of demonstrating its present responsibility under FAR Subpart 9.4. I therefore find that the administrative agreement requested by NAC's counsel would at this time be an inappropriate resolution of this proceeding.

29. NAC and certain of its affiliates are currently accepting freight from DoD for shipment and are likely to do so in the near future. It is therefore necessary to take immediate action to protect the Government's interests.

BASES FOR THE PROPOSED DEBARMENTS

1. The conviction of NAC provides a separate and independent basis for its debarment, pursuant to FAR 9.406-2(a)(3) and (5).

2. The conduct of NAC, Alf, Cihak, Machlowski, and Weir is of so serious or compelling a nature as to affect their present responsibility to be Government contractors or subcontractors and provides a separate and independent basis for their debarments, pursuant to FAR 9.406-2(c).

3. NAC's violations of the terms of one or more Government contracts or subcontracts, so serious as to require debarment, provide separate and independent bases to debar NAC pursuant to FAR 9.406-2(b)(1)(i).

4. Pursuant to FAR 9.406-1(b), debarments may be extended to the affiliates of a contractor.

a. NACH, NAC, NACG, NACA, NAC-L, NAC-M, NAC-ME, NACM, NACM Holdings, NAC AC, NAC 300, NAC 2000, and Alf are affiliates as defined in FAR 9.403 ("affiliates"), because directly or indirectly NACH and Alf control or can control NAC, NACG, NACA, NAC-L, NAC-M, NAC-ME, NACM, NACM Holdings, NAC AC, NAC 300, and NAC 2000. The affiliation of NACH, NAC, NACG, NACA, NAC-L, NAC-M, NAC-ME, NACM, NACM Holdings, NAC AC, NAC 300, NAC 2000, and Alf provides a separate basis for their debarments.

b. NAC, Alf, Cihak, Machlowski, Weir and Smistek are affiliates as defined in FAR 9.403 ("affiliates"), because directly or indirectly Alf, Cihak, Machlowski, Weir and Smistek control or can control NAC. The affiliation of NAC, Alf, Cihak, Machlowski, Weir and Smistek provides a separate basis for their debarments.

c. NAC, NACG, Alf, Cihak, Machlowski, Weir and Smistek are affiliates as defined in FAR 9.403 ("affiliates"), because directly or indirectly NAC, Alf, Cihak, Machlowski, Weir and Smistek control or can control NACG. The affiliation of NAC, NACG, Alf, Cihak, Machlowski, Weir and Smistek provides a separate basis for their debarments.


d. NAC-D, Windward, and Alf are affiliates as defined in FAR 9.403 ("affiliates"), because directly or indirectly Alf controls or can control NAC-D and Windward. The affiliation of NAC-D, Windward, and Alf provides a separate basis for their debarments.

5. Pursuant to FAR 9.403, interlocking management or ownership, shared facilities and equipment, and common use of employees are "indicia of control" so as to make entities affiliates of each other. NACH and NAC are affiliates of each other as evidenced by the use of shared facilities, and interlocking management and ownership. The affiliation of NACH and NAC provides a separate basis for their debarments.

6. Pursuant to FAR 9.403, an "identity of interests among family members" is an "indicia of control" so as to make one family member an affiliate of another. Alf and Smistek are, therefore, affiliates of each other, as defined by FAR 9.403, because Alf and Smistek are husband and wife, and at least indirectly each had the power to control the other, as evidenced by an identity of interests among family members. The affiliation provides a separate basis for their debarments, pursuant to FAR 9.406-1(b).

7. Pursuant to FAR 9.406-5(a), the seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with their performance of duties for or on behalf of the contractor. The seriously improper conduct of Alf, Cihak, Machlowski, and Weir may be imputed to NAC because their seriously improper conduct occurred in connection with their performance of duties for or on behalf of NAC, or with the knowledge, approval, or acquiescence of NAC. The imputation of the seriously improper conduct of Alf, Cihak, Machlowski, and Weir to NAC provides a separate and independent basis for the debarment of NAC.

8. Pursuant to FAR 9.406-5(b), the criminal, fraudulent, and seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor, who knew of, or had reason to know of the contractor's criminal, fraudulent, and seriously improper conduct. The seriously improper conduct of NAC may be imputed to Alf, Cihak, Machlowski, Weir and Smistek, because as officers, directors, shareholders, partners, employees, or other individuals associated with NAC, Alf, Cihak, Machlowski, Weir and Smistek participated in, knew of, or had reason to know of NAC's seriously improper conduct. These imputations provide separate and independent bases for the debarments of Alf, Cihak, Machlowski, Weir and Smistek.



STEVEN A. SHAW
Deputy General Counsel
(Contractor Responsibility)

ENCL 2



DEPARTMENT OF THE ARMY
US ARMY MEDICAL MATERIEL CENTER, EUROPE
CMR 434
APO AE 09138

MCMR-MCZ

13 May 2008

MEMORANDUM THRU Chief, Procurement Fraud Branch (KFLD-PF), Office of the Judge Advocate General, Department of the Army, Suite 510, N. Stuart Street, Arlington, VA 22203-1837

FOR Army Suspension and Debarment Official (Mr. Robert Kittel)

SUBJECT: National Air Cargo Compelling Reason Request

1. Request that National Air Cargo (NAC) be granted 60 days from when the USG announces a decision to debar NAC to deliver medical materiel to the CENTCOM AOR.

2. As of this date, neither USAMMCE, CENTCOM nor TRANSCOM can verify that DHL, Khuene & Nagel, FEDEX, or UPS Supply Chain Solutions can meet our requirements and we therefore request the continued use of NAC to deliver medical materiel ISO OEF/OIF for a period of time (NTE 60 days or until a replacement contractor is identified) to ensure continued medical materiel support to the deployed force. Due to the required level of service for medical materiel, the United States Army Medical Materiel Center, Europe (USAMMCE) has relied upon NAC to deliver medical materiel to the CENTCOM AOR. NAC has consistently met or exceeded the following transportation requirements:

a. Ability to deliver within 96 hours to all destinations and next day/flight for life or death urgent shipments

b. Cold-chain management both small shipments and large (> 300 lbs) to include re-icing capabilities; both wet and dry-ice

c. Narcotics shipments and need for onboard courier service

d. HAZMAT shipments and documentation process/procedures

3. In coordination with USTRANSCOM, we have begun negotiations with DHL and UPS to ensure that our requirements are documented and understood. We will begin utilizing/evaluating these carriers to determine if they can meet our transportation requirements. A 60 day period provides us the needed time to transition to a new carrier that is capable of performing at or higher than NAC.

MRMC-MCZ

SUBJECT: National Air Cargo Compelling Reason Request

4. Approval of this request directly supports saving the lives of our Soldiers, Sailors, Airmen, Marines, and Civilians currently deployed ISO GWOT. POC for this action is the undersigned at

[REDACTED]

[REDACTED]

~~KEVIN B. OWENS~~
COL, MS
Commanding

cc:

CDR, MRMC

Mr. Trevor, Contract & Fiscal Law Division